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No. 84-1200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EDWIN MEESE III, ATTORNEY GENERAL, *et al.*,
Petitioners,

v.

HENRY W. SEGAR, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in stating, in dictum, that an employer who seeks to rebut a prima facie case of disparate treatment in a class action under Title VII by identifying a job practice that causes the disparity may, in an appropriate case, have to show the business necessity of the practice in order to complete its rebuttal showing that the practice is a "legitimate, *non-discriminatory* explanation" for the disparity.

2. Whether the district court clearly erred in finding, under unquestioned principles of law, that plaintiffs' statistical analyses included all variables necessary to constitute probative evidence of disparities in salary and grade at entry between black and white employees.

TABLE OF CONTENTS

	Page
STATEMENT	1
REASONS FOR DENYING THE WRIT	10
CONCLUSION	18

TABLE OF AUTHORITIES

CASES:

Anderson v. Bessemer City, 53 U.S.L.W. 4314 (U.S. Mar. 19, 1985) (No. 83-1623)	13
Bazemore v. Friday, 751 F.2d 662 (4th Cir. 1984)	13
Belcher v. Stengel, 429 U.S. 118 (1976)	12
Berenyi v. Immigration Director, 385 U.S. 630 (1967)	13
Board of Education v. Harris, 444 U.S. 130 (1979)	11
Cichos v. Indiana, 385 U.S. 76 (1966)	12
Dothard v. Rawlinson, 433 U.S. 321 (1977)	14
EEOC v. H.S. Camp & Sons, Inc., 542 F. Supp. 411 (M.D. Fla. 1982)	16
Foman v. Davis, 371 U.S. 178 (1962)	16
Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978)	14
General Talking Pictures Co. v. Western Electric Co., 304 U.S. 174 (1938)	13
Graver Tank & Manufacturing Co. v. Linde Air Products Co., 336 U.S. 271 (1949)	13
Isaac v. Butler's Shoe Corp., 511 F. Supp. 108 (N.D. Ga. 1980)	16
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	20
The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959)	12, 17, 18
Mortensen v. Callaway, 672 F.2d 822 (10th Cir. 1982)	16
Pope v. City of Hickory, 679 F.2d 20 (4th Cir. 1982)	16

TABLE OF AUTHORITIES—Continued

	Page
Pouncy v. Prudential Insurance Co., 668 F.2d 795 (5th Cir. 1982)	15, 16
Rivera v. City of Wichita Falls, 665 F.2d 531 (5th Cir. 1982)	15, 16
Rudolph v. United States, 370 U.S. 269 (1962)	13
Sanchez v. Borras, 283 U.S. 798 (1931)	12
Smith v. Butler, 366 U.S. 161 (1961)	12
Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508 (1924)	13
Texas v. Mead, —— U.S. ——, 104 S. Ct. 1318 (1984) (Stevens, J.)	13
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)	14
United States v. Johnston, 268 U.S. 220 (1925)	13
United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983)	12, 14
Valentino v. United States Postal Service, 674 F.2d 56 (D.C. Cir. 1982)	14
Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971)	16
STATUTES AND REGULATIONS:	
Fed. R. Civ. P. 15	16
42 U.S.C. § 2000e *et seq.* (1982)	1
28 C.F.R. § 50.14 (1984)	11
Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38,290 (1978)	11
OTHER AUTHORITIES:	
S. Masters, Black-White Income Differentials: Empirical Studies and Policy Implications (1975)	2
L. Thurow, Poverty and Discrimination (1969)	2

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

1. The district court found, based on the evidence at trial, that the Drug Enforcement Administration (DEA) engaged in disparate treatment of its black special agents as a class in violation of Title VII of the Civil Rights Act of 1964,[1] which was reflected in substantial—and highly statistically significant—disparities in salary between similarly qualified white and black agents.[2] The court further found that five specific employment practices at DEA—initial grade assignments, work assignments, supervisory evaluations, discipline, and promotions—had un-

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[1] 42 U.S.C. § 2000e *et seq.* (1982).

[2] App. 106a-11a, 140a-41a.

lawful disparate impacts on black special agents.[3] Defendants ask this Court to review only two of those determinations: the findings of discrimination in salaries and initial grade assignments. They raise no issue with respect to the findings of discrimination in work assignments, supervisory evaluations, discipline, or promotions.

2. From the outset, the case proceeded on both disparate treatment and disparate impact theories.[4] Plaintiffs identified before trial each employment practice they challenged; and they presented evidence separately and independently on each.[5]

3. The two-week trial focused principally on the statistical evidence presented by both sides. To support their classwide disparate treatment claim, plaintiffs introduced a study of the salaries of black and white special agents that showed black agents to be earning about $3,000 less per year than whites, on the average. In order to discover whether and to what extent race explained that disparity, plaintiffs' experts (two professors of labor economics) formulated a multiple regression analysis based on a "human capital model." That approach, which the courts below found to be "widely accepted," builds on labor economists' findings that the human capital an employee brings to a job—such as education and experience—in large measure determines the employee's success.[6] In this case, objective and quantifiable information was available

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[3] App. 111a-18a, 141a-45a.

[4] *See* Plaintiffs' Final Pretrial Statement 1-12 (filed Mar. 30, 1979); Plaintiffs' Post-Trial Memorandum 1-12 (filed June 25, 1979); App. 138a-45a (dist. ct.), 19a-20a, 31a (ct. app.).

[5] *See* Complaint ¶¶ 12-13, 18-27; Plaintiffs' Final Pretrial Statement 1-8, 10-12 (filed Mar. 30, 1979); App. 106a-19a (dist. ct.), 7a, 9a-13a (ct. app.).

[6] App. 9a; *see, e.g.*, L. Thurow, Poverty and Discrimination (1969); S. Masters, Black-White Income Differentials: Empirical Studies and Policy Implications (1975).

for all DEA agents, from defendants' computerized records, on three important "human capital" factors: education, prior nonfederal experience, and prior federal experience (which included length of service at DEA when the salary measurements were taken). Plaintiffs' experts included those variables and race as the independent variables in their regressions.

The regressions showed that, as of October 1978, black agents were paid about $2,000 per year less than white agents on the average, even after differences in education and experience were accounted for. That disparity, and similar disparities for four other dates, were statistically significant at beyond the .001 level, indicating that "the probability of any of the above disparities happening by chance is less than one in a thousand." [7]

Plaintiffs also introduced separate and independent statistical analyses with respect to each of the specific employment practices alleged to have a disparate impact on black agents. Those analyses showed that blacks as a group were hired at a lower initial GS grade than similarly qualified whites, were assigned a disproportionate amount of undercover work, were evaluated much more severely by DEA's predominantly white supervisors, received more and harsher discipline, and received promotions more slowly than white agents at GS levels 11 and above.[8] These disparities were statistically significant at

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[7] App. 107a (dist. ct.); *see* App. 10a (ct. app.). To prove that the salary disparities were not caused by discrimination occurring before 1972 (when Title VII become applicable to defendants), plaintiffs presented a further analysis that included only agents hired after 1972. Even though most of the agents in that analysis had been with the agency a very short time, the analysis showed that, as of October 1978, there was a disparity of over $1,000 between black and white agents on the average, after differences in qualifications were taken into account. That disparity was significant at the .05 level. App. 107a (dist. ct.), 10a-11a (ct. app.).

[8] App. 111a-18a (dist. ct.), 12a (ct. app.).

high levels—some as high as .0001, corresponding to a probability of less than one in ten thousand that the disparities could have occurred by chance.[9]

Defendants challenged the reliability of plaintiffs' statistical analyses. In particular, defendants suggested that the analyses of salary and grade at entry were unpersuasive because they failed to account for the possibility that more of the white agents' prior experience than of the black agents' prior experience was in criminal law enforcement work.[10] Defendants pointed to Civil Service rules establishing requirements for entry at the GS-7 and GS-9 levels. All agents hired at GS-7 must have three years of "general experience" and one year of "specialized experience," both of which terms are defined in Civil Service documents.[11] The year of "specialized experience" must be in criminal investigative work or other compar-

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[9] *E.g.*, App. 116a.

[10] *See* App. 107a-09a, 112a-13a, 140a-41a (dist. ct.), 13a, 36a-37a (ct. app.).

[11] The Civil Service Commission Handbook defines "general experience" as:

> "[P]rogressively responsible experience which has required (1) ability to work or deal effectively with individuals or groups of persons; (2) skill in collecting and assembling pertinent facts; (3) ability to prepare clear and concise reports; and (4) ability and willingness to accept responsibility."

"Specialized experience" is defined as:

> "[P]rogressively responsible investigative experience which demonstrates (1) initiative, ingenuity, resourcefulness, and judgment required to collect, assemble and develop facts and other pertinent data; (2) ability to think logically and objectively, to analyze and evaluate facts, evidence, and related information, and arrive at sound conclusions; (3) skill in written and oral reports and presentation of investigative findings in a clear and concise manner; and (4) tact, discretion, and capacity for obtaining the cooperation and confidence of others."

App. 101a-02a (dist. ct.), 37a-38a (ct. app.).

able work.[12] The requirements for GS-9 are the same, except that an agent must have an additional year of "specialized experience," which need not be in criminal or comparable work.[13]

Defendants argued that the additional year of "specialized experience" was a "minimum objective qualification" for entry at GS-9 and that the failure to include that as a variable robbed plaintiffs' regressions of any probative force. However, as the courts below noted, defendants made no attempt to show that the disparities in salary and grade at entry were actually explained by a difference in "specialized experience." They presented no evidence that blacks even had less "specialized experience" than white agents.[14] To the contrary, defendants' expert testified that he collected what data he could from individual personnel folders on agents' prior law enforcement and military experience; but he did not even subject the data to statistical tests, because "it appeared to me that it's pretty even across the board in all those things" and "it didn't appear to me [that any disparities] could be explained by any of those factors."[15] Thus, the

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[12] *Id.*

[13] *Id.*

[14] *See* App. 107a-09a, 111a-13a, 140a-41a (dist. ct.), 40a-42a, 63a (ct. app.).

[15] Joint Exh. V (Spradlin Dep. I, at 26-27, 206-07, 209-42). Defendants' expert could not say whether the information he collected under the headings "law enforcement" and "military" experience fell within the Civil Service definition of "specialized experience." *Id.* at 227-30. One DEA official expressed the view that police experience would not satisfy the Civil Service criteria unless the applicant had spent at least 50% of his or her time in investigations requiring the use of investigative methods such as surveillance and assuming an undercover role. App. 120a.

DEA's expert did his own salary and grade-at-entry analyses, in which he did not include law enforcement or military experience—or any other qualifications. App. 113a. By contrast, plaintiffs' studies included all of the data on education, nonfederal experience, and

only evidence on this issue tended to show that "specialized experience" did *not* explain the disparities.

Defendants presented studies of their own with respect to salary, grade at entry, promotions, and discipline, in order to show an absence of discrimination. They relied chiefly on a "cohort analysis," which defendants say showed no disparity between black and white salaries.[16] To the contrary, when the cohort results were aggregated by a method defendants' expert admitted was proper, the analysis showed a disparity adverse to black agents that was significant at the .001 level.[17] The cohort analysis thus tended, if anything, to confirm plaintiffs' proof. Defendants presented no rebuttal studies with respect to work assignments or supervisory evaluations.

There was also extensive nonstatistical evidence on both sides. Plaintiffs presented the testimony of an industrial psychologist that defendants' systems for supervisory evaluations and promotions did not meet professional standards and that the deficiencies increased the likelihood that white supervisors might discriminate against nonwhites.[18] Plaintiffs also presented direct testimony by black agents with respect to DEA's general practices and specific instances of discrimination.[19] Defendants did not rebut the industrial psychologist's testimony; but they did present rebutting anecdotal testimony and evidence of DEA's efforts to achieve equal employment opportunity.[20]

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federal experience available from the Department of Justice's computerized personnel records. App. 106a, 111a (dist. ct.), 9a (ct. app.).

[16] Pet. 5.

[17] App. 60a-61a; *see* Tr. 1937, 2001-03; Plaintiffs' Exh. 53; Joint Exh. V (Spradlin Dep. II, at 16-23).

[18] Plaintiffs' Exh. 8; *see* App. 126a-30a, 143a-45a.

[19] App. 119a-32a, 136a-37a.

[20] App. 132a, 137a.

4. The district court, after receiving proposed findings from both sides, issued careful and extensive findings that adopted neither side's submission.[21] The court found that plaintiffs had proven disparate treatment of black special agents as a class, and also that each of the five specific practices listed above had a disparate impact on black agents.[22] The court evaluated the nonstatistical evidence together with the statistical showings and found that the evidence "firmly" and "overwhelmingly" established an inference of discrimination.[23] The court rejected defendants' attack on plaintiffs' salary and grade-at-entry analyses, finding that quantifying an agent's "specialized experience" was "impossible because the qualifications are all subjective in nature" and that defendants had produced no proof that there were any differences in such experience that could have caused the disparities between black and white agents.[24] DEA's assignment of black agents excessively to undercover work was found not only to have a disparate impact on black agents but also to constitute intentional disparate treatment.[25]

Shortly after the district court's decision, plaintiffs sought and the court granted a preliminary injunction to

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[21] App. 99a-147a.

[22] App. 140a-45a.

[23] App. 142a, 145a. The court found that defendants had rebutted much of plaintiffs' anecdotal testimony. App. 137a. However, contrary to defendants' assertion (Pet. 3, 6, 10), the court credited much of plaintiffs' direct evidence, with respect to the overall operation of DEA's practices as well as some specific instances of discrimination. App. 125a-32a, 136a-37a, 142a-45a (dist. ct.), 45a (ct. app.).

[24] App. 112a, 140a-41a.

[25] App. 142a-43a. With respect to three other challenged practices (training, reprisals, and the use of Schedule A appointments), the court found that plaintiffs had failed to carry their burden of proof. App. 146a-47a. Plaintiffs' claims with respect to hiring had been settled before trial. App. 100a.

prevent defendants from demoting Carl Jackson, the highest ranking black agent at DEA, who had been a chief witness for plaintiffs at the trial. The district court found, after a hearing, that Jackson was "very likely to prevail on the merits" of his claim that the demotion was in retaliation for his role at the trial, and that defendants' treatment of Jackson "epitomizes the main action." [26]

The district court later held further proceedings on relief and entered a relief order.[27]

5. The court of appeals affirmed the district court's liability findings but vacated the remedial order and remanded the case for further consideration of remedies.[28] The appellate court upheld the district court's finding that plaintiffs' salary and grade-at-entry studies accounted sufficiently for all "minimum objective qualifications" to be considered probative in determining whether plaintiffs had carried their ultimate burden of proof. It specifically upheld the district court's findings that the Civil Service definition of "specialized experience" is subjective and unquantifiable and that defend-

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[26] Memorandum Opinion dated May 5, 1981, at 8-9.

[27] In the relief proceedings, 2½ years after trial, defendants asked the district court to reopen the liability issue and receive further statistical analyses that DEA said would disprove liability. Those analyses contained only data that had been available at the time of trial; and they revealed on their face some of the same methodological errors that the district court found in defendants' evidence at trial. The court rejected the submission as "a belated attempt to relitigate issues the court resolved after extensive briefing, argument and consideration." Memorandum Opinion dated Feb. 17, 1982, at 3.

[28] Defendants do not seek review of any relief issues. Pet. 7 n.9. The court of appeals also affirmed the preliminary injunction barring the demotion of Carl Jackson. App. 79a-80a. Defendants do not seek review of that ruling.

ants failed to substantiate their hypothesis that such experience might be related to the proven disparities.[29]

In a prefatory discussion of Title VII principles, the court of appeals discussed "two ways" in which disparate impact issues may be involved in a disparate treatment class action:

> "First, in addition to bringing a pattern or practice disparate treatment claim, plaintiffs may well challenge the disparate impact of specific employment practices and thus force the employer to prove the job-relatedness of those practices." [30]

The court observed that this is such a case, and analyzed it as such.[31]

Second, even where plaintiffs make only a classwide disparate treatment claim, disparate impact analysis may become implicated as the result of the employer's successful showing, in rebuttal, that a specific employment practice caused the perceived disparity. As the court noted, in making such a showing the employer will have proven that the practice is prima facie discriminatory under a disparate impact theory. In such a case, the court said, the employer may complete its rebuttal just as it would in a disparate impact case: by showing the business necessity of the practice causing the disparity. The court recognized that this case does not fall in that second category, because defendants made no showing that the requirement of a second year of "specialized experience" had any relationship to the observed disparities in salary and grade at entry.[32] That discussion of what this case does not involve is the chief focus of the petition.

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[29] App. 39a-41a.

[30] App. 19a.

[31] App. 19a-20a, 31a-32a; *see* 34a-64a.

[32] App. 61a-66a; *see id.* 36a-42a.

REASONS FOR DENYING THE WRIT

Defendants ask this Court to review a dictum in the court of appeals' opinion whose correctness—as the court below acknowledged—could not possibly affect the outcome of this case. Grudgingly admitting that the matter is "alternative holding or dictum in this case," [33] defendants nonetheless try to make it seem relevant here by distorting the record and findings below. When the distortions are stripped away, all that is left is a question of evaluation of the evidence—a question on which, after careful consideration, the two lower courts have concurred.[34] Moreover, even if the challenged dictum were a holding, it would be consistent with established law and would have none of the crippling effects defendants assert.[35] Defendants' strained predictions about what that dictum might lead other courts to do in circumstances not presented here provide no reason for review of this interlocutory ruling in this litigation.

1. Defendants portray this case as a disparate treatment case transformed, by a stroke of the court of appeals' pen, into a disparate impact case; and they suggest that DEA was, as a result, unfairly required to prove the business necessity of the Civil Service requirement for entry at GS-9.[36] That portrayal is simply wrong. Plaintiffs presented disparate impact claims from the outset of the litigation, in addition to their classwide disparate treatment claim. The complaint identified specific employment practices at DEA that plaintiffs claimed, and later proved, operated discriminatorily with respect to black special agents.[37] The district court

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[33] Pet. 20.

[34] Defendants admit that this evaluation of evidence involves application of a "rule of reasonableness" and that the result "will depend on the facts of each case." Pet. 24-25.

[35] *See* Pet. 20.

[36] *See* Pet. 2-3 n.2, 14 n.16, 19.

[37] *See* authorities cited in notes 4-5 *supra*.

made, and the court of appeals affirmed, findings that five specific employment practices at DEA had disparate impacts on black agents.[38] Indeed, defendants raise no issue with respect to most of those disparate impact findings.[39]

2. Defendants' rebuttal of plaintiffs' classwide disparate treatment claim never reached the point at which a need to show business necessity might have arisen. This case was not decided on the ground that defendants failed to show the business necessity of the requirement of an extra year of "specialized experience" for entry at GS-9. That issue never arose, because defendants never showed that the requirement had anything to do with the disparities proven by plaintiffs.

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[38] App. 140a-45a (dist. ct.), 19a-20a, 31a (ct. app.). Defendants are therefore wrong in asserting (Pet. 2-3 n.2, 14 n.16) that neither court below applied disparate impact analysis to plaintiffs' claims except in the court of appeals' dictum about rebuttal methods.

All statistical showings on which the district court based its findings were significant at the .05 level or better. Defendants suggest that disparities significant at the .05 level are not probative unless they also satisfy the rough four-fifths rule mentioned in the federal Uniform Guidelines. Pet. 14-15 n.16. But the guidelines recognize that the four-fifths rule does not replace the concept of statistical significance; and they adopt the .05 standard as sufficient in this area, as do social scientists and courts generally. Indeed, defendants' own experts supported the .05 standard. *See* Uniform Guidelines on Employee Selection Procedures §§ 4(D), 14(B)(5), 43 Fed. Reg. 38290, 38297, 38301 (1978); 28 C.F.R. § 50.14 (1984); App. 118a (dist. ct.), 10a, 53a (ct. app.).

[39] Defendants incorrectly suggest that the lower courts declined to apply disparate impact analysis to those five employment practices because the practices are not proper subjects for such analysis. Pet. 2-3 n.2. To the contrary, the court of appeals correctly noted that "disparate impact appropriately applies to them." App. 64a-65a; *cf. Board of Education v. Harris*, 444 U.S. 130, 151 (1979) (disparate impact analysis applied to teacher assignments in setting analogous to Title VII). Indeed, defendants never challenged below the propriety of applying disparate impact analysis to those practices. App. 64a-65a.

Both courts below found that defendants produced not a shred of evidence that a difference between the races in "specialized experience" even existed, let alone that it explained the disparities proven by plaintiffs.[40] In fact, the only evidence on the issue, from defendants' own expert, was that no such difference existed.[41] The court of appeals expressly did *not* impose on defendants a duty to prove the business necessity of the Civil Service criterion for GS-9, because defendants had failed to substantiate a rebuttal based on that criterion. The court said that, "*even had* DEA succeeded" in rebutting plaintiffs' case, a requirement to show business necessity might have arisen.[42] Since it did not, review by this Court of the court of appeals' dictum about business necessity could have no effect on the outcome of this case.[43]

3. What this case did turn on was the trial court's conclusion that plaintiffs carried their ultimate burden of proof, on both disparate treatment and disparate impact. This Court has recently reminded the lower courts that, once all the evidence is in, a Title VII case is like any other: The trier of fact must weigh all of the plaintiff's and defendant's evidence and decide whether plaintiff has carried his burden of persuasion. *United States Postal Service Board of Governors v. Aikens*, 460 U.S.

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[40] App. 140a-41a (dist. ct.), 40a-42a, 63a-64a (ct. app.).

[41] *See* note 15 *supra* and accompanying text.

[42] App. 65a (emphasis added). *See also* App. 65a-66a ("In this situation the trial court *would* properly have applied the disparate impact analysis. . . ."); *id.* 66a (*"Had DEA made a credible showing* . . . DEA would have been required. . . ."); *id.* ("even had DEA succeeded") (all emphasis added).

[43] The Court declines to grant certiorari in these circumstances. *E.g., Belcher v. Stengel*, 429 U.S. 118 (1976); *Cichos v. Indiana*, 385 U.S. 76 (1966); *Smith v. Butler*, 366 U.S. 161 (1961); *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959); *Sanchez v. Borras*, 283 U.S. 798 (1931).

711, 714-15 (1983). The trial court did precisely that here: It considered defendants' expert's opinion on the persuasiveness of plaintiffs' regression analyses in light of the views of plaintiffs' experts, the subjectivity of the requirement of "specialized experience," the difficulty of obtaining quantifiable evidence of such experience, defendants' failure even to try to show that a difference in "specialized experience" caused the disparities, and the admission by defendants' expert that there seemed to be no difference between blacks and whites in prior law enforcement experience. After weighing all of the evidence together, the court found plaintiffs' proof to be persuasive. The court of appeals, carefully following *Aikens*, upheld the findings as not clearly erroneous.[44] Such concurrent findings of fact by two lower federal courts are not appropriate material for review by this Court.[45]

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[44] App. 33a-34a & n.20, 61a-65a. This Court recently reemphasized the deference owed to a trial court's factual findings. *Anderson v. Bessemer City*, 53 U.S.L.W. 4314 (U.S. Mar. 19, 1985) (No. 83-1623).

[45] *See Graver Tank & Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *Berenyi v. Immigration Director*, 385 U.S. 630, 635 (1967); *cf. Rudolph v. United States*, 370 U.S. 269, 270 (1962); *General Talking Pictures Co. v. Western Electric Co.*, 304 U.S. 175, 178 (1938); *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924). *See also Texas v. Mead*, —— U.S. ——, 104 S. Ct. 1318 (1984) (Stevens, J.).

There is no conflict among the circuits on any matter related to this issue. In *Bazemore v. Friday*, 751 F.2d 662 (4th Cir. 1984), the Fourth Circuit affirmed (applying the "clearly erroneous" test, *id.* at 668) a district court ruling that a specific statistical analysis did not suffice because it failed to include certain variables. Neither the analysis nor the omitted variables were analogous to those that the district court accepted in this case.

In *Bazemore*, the study sought to explain salary differentials among state employees in various counties in North Carolina. The district court had concluded, on the basis of evidence before it, that the plaintiffs' study was not persuasive because it failed to take

4. Finally, the dictum of the court of appeals to which defendants object is entirely consistent with established Title VII law and will not cause the horrible consequences defendants predict. Defendants assert that the court placed on them a burden beyond that permitted by *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). They are mistaken. The burden placed on employers by *Burdine* is to articulate a "legitimate, *nondiscriminatory* reason" for an observed disparity.[46] If an employer shows only that one of his employment practices caused the observed classwide disparity, he will not have met this burden because the practice will be prima facie *discriminatory* under this Court's holdings. *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977). The need for proof that the employment practice is motivated by business necessity is inherent in, not inconsistent with, the burden imposed by *Burdine*.

This Court has stressed that the prima facie method of structuring a Title VII trial "was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978); *see United States Postal Service v. Aikens*, 460 U.S. 711, 715 (1983). The

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account of across-the-board pay raises in some counties, which were nondiscriminatory but would have the effect in the analysis of magnifying existing disparities in salary. *Id.* at 672. It also found that the study failed to exclude pre-Title VII discrimination. *Id.* There were no comparable omissions from the analyses provided by plaintiffs in this case.

The D.C. Circuit's approach to determining the adequacy of a regression analysis is very similar to the Fourth Circuit's. *See Valentino v. United States Postal Service*, 674 F.2d 56 (D.C. Cir. 1982); App. 35a-42a. And the two courts applied the same "clearly erroneous" test in affirming the trial courts' findings here and in *Bazemore*.

[46] 450 U.S. at 254 (emphasis added). *See also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

rule suggested by the court of appeals' dictum in this case is no more than a way of avoiding a needless procedural wrangle in cases implicating both disparate treatment and disparate impact analysis—a wrangle that, we emphasize, did not arise here.

Nor does the dictum conflict with Title VII law as established in other circuits. The court of appeals did say that it disagreed with certain language used with respect to disparate impact cases in *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795, 800 (5th Cir. 1982), and *Rivera v. City of Wichita Falls*, 665 F.2d 531, 539 (5th Cir. 1982).[47] But the holdings in those cases are not inconsistent with either the holding here or the court of appeals' dictum about rebuttal burdens. In those cases, the plaintiffs did not prove disparate treatment[48] or prove that specific practices had disparate impacts. They merely complained of an overall salary disparity not amounting to disparate treatment, and asserted without proof that the observed disparity was caused by defendants' practices. The *Pouncy* and *Rivera* courts held that defendants would not be required to validate employment practices that had not been proven to have disparate impacts.

Those rulings are wholly consistent with the liability ruling here, where plaintiffs proved disparate treatment *and* separately proved that each of five specific employment practices had a disparate impact on the plaintiff

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[47] App. 29a-30a.

[48] In *Pouncy*, plaintiffs failed in an attempt to prove disparate treatment. The district court found, and the Fifth Circuit affirmed, that their statistics, which merely compared the average salaries of blacks and whites with no control for different educational or employment backgrounds, failed to raise an inference of disparate treatment. *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795, 802-03. The portion of the plaintiffs' claim in *Rivera* that led to the Fifth Circuit's language did not implicate disparate treatment. *Rivera v. City of Wichita Falls*, 665 F.2d 531, 539 (5th Cir. 1982).

class. They are also consistent with the court of appeals' dictum about a defendant's burden in rebutting a prima facie case of disparate treatment. Where a prima facie case has been proven, if the defendant does not offer a rebuttal, the plaintiff will have established liability. If the defendant, in rebuttal, shows that one of his employment practices caused the disparity, then that specific practice has been shown to have a disparate impact. A requirement to validate that practice then arises, and that requirement does not conflict with the holdings in *Pouncy* and *Rivera*.[49]

Defendants' worries about the consequences of the court of appeals' dictum are similarly unfounded. The requirement to show the business necessity of a practice that has a disparate impact is not an excessive burden on the employer; it is precisely the requirement imposed on every employer when disparate impact has been shown. Indeed, plaintiffs would generally have the freedom to amend their complaint to state a disparate impact claim in the circumstances hypothesized by the court of appeals, under the liberal rules of Fed. R. Civ. P. 15.[50] Nor is there any defect of notice, because the

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[49] Neither of the other two court of appeals decisions on which defendants rely is even remotely inconsistent with the decision below. Both *Mortensen v. Callaway*, 672 F.2d 822 (10th Cir. 1982), and *Pope v. City of Hickory*, 679 F.2d 20 (4th Cir. 1982), were individual, and not class, actions. Neither involved an explanatory defense. Each stands for the unchallenged proposition that a disparate impact claim cannot be stated in the absence of a specific employment practice asserted to cause disparate impact.

[50] *See, e.g., EEOC v. H.S. Camp & Sons, Inc.*, 542 F. Supp. 411, 418-19 (M.D. Fla. 1982) (allowing amendment of complaint to conform to evidence after trial, to include claims of discrimination in areas not stated in original complaint); *Isaac v. Butler's Shoe Corp.*, 511 F. Supp. 108, 112-13 (N.D. Ga. 1980) (allowing amendment of complaint to include claim of disparate impact in denying motion to dismiss). *See generally Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971); *Foman v. Davis*, 371 U.S. 178, 182 (1962).

defendant will generally have notice early on by virtue of its own decision to present an explanatory defense. The opinions below leave ample room to accommodate any case in which a defendant does not in fact have adequate notice of the need to show business necessity.[51]

There is nothing to support defendants' bare assertion that the dictum below will "circumvent the possibility of conciliation." During any attempts at conciliation, defendants should be able to anticipate that they will or might raise a defense of a practice motivated by business necessity, and they are thus in no different position than any defendant today attempting to conciliate a disparate impact claim. For the same reason, the ruling will not impair any of the goals of the requirement of exhaustion of administrative remedies. All elements of the claim are available to be resolved during the administrative process, and the employer's defenses as well as the plaintiffs' claims should be aired there to avoid prejudice to the plaintiffs at trial.

Finally, the situation hypothesized by the court of appeals is unlikely to arise often. It would arise only when a defendant in a disparate treatment class action asserts as an explanatory defense a practice that has not been challenged directly by the plaintiffs. Plaintiffs in this case did not overlook their opportunity to challenge specific practices believed to have disparate impacts, and there is no reason to think that Title VII plaintiffs generally would do so.

In short, defendants' parade of horribles does not establish a need for this Court to issue what would be an advisory opinion in this case. As this Court said in *The*

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[51] The court of appeals' analysis was stated in terms of what would "typically" occur, and Judge Edwards in concurrence stressed that the approach described by the court would apply only "[s]o long as the defendant has adequate notice of the need to prove business necessity." App. 27a, 97a.

Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 184 (1959), review by this Court of the consequences defendants fear "can await a day when the issue is posed less abstractly."

CONCLUSION

For these reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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